



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002020

First-tier Tribunal No: PA/50554/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 5th of June 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

BA
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Holmes instructed by Shawstone Associates
For the Respondent: Mrs R Arif, a Senior Home Office Presenting Officer.

Heard at Birmingham Civil Justice Centre on 20 May 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant appeals with permission a decision of First-tier Tribunal Judge N Malik ('the Judge'), promulgated on 27 April 2023, in which the Judge dismissed her appeal on all grounds.
2. The Appellant claimed to be a citizen of Eritrea born in 1991.
3. The Judge's findings are set out from [19] of the decision under challenge.
4. The Judge refers to an earlier decision promulgated by a different judge of the First-tier Tribunal on 24 June 2018, which found the Appellant's account to be

- incredible and that she was an Ethiopian and not Eritrean citizen. The Judge sets out the proper self-direction, in accordance with the judgement in the case of Devaseelan, that earlier determination formed the starting point when considering the merits of the claim in the current appeal, although was not determinative, requiring the Judge to consider any new evidence provided that may warrant a different finding being made [20].
5. The Judge noted at [22] that there was a single issue in the appeal as if the Appellant is Eritrean, she succeeds. The Judge noted that the Appellant relied on new evidence which is referred to at [22].
 6. At [34], having considered both the documentary and oral evidence, the Judge writes:
 34. Consequently, for all the reasons given in this decision, I find this is not one of those occasional cases where the circumstances surrounding the first appeal were such that it would be right for me to look at the matter as if the first decision had never been made. Further having considered the new/additional evidence provided in this appeal, I find it no reason to depart from the findings of the previous Judge that the appellant is an Ethiopian national.
 7. The Appellant sought permission to appeal which was refused by another judge of the First-tier Tribunal and renewed to the Upper Tribunal.
 8. The Appellant relied on three grounds being (i) that the Judge had failed to consider the witness evidence in the round, (ii) that the Judge had failed to give adequate reasons, and, (iii) that the Judge had proceeded under an inadvertent mistake of fact giving rise to a procedural fairness issue. For the reasons more fully set out in the pleadings dated 10 May 2023.
 9. Permission to appeal was granted by Upper Tribunal Judge Kamara on 4 July 2023 on the base it was arguable *that the First-tier Tribunal erred in rejecting the evidence of a witness because the appellant had been found to have provided an incredible account by the judge who heard her previous appeal. It is alternatively argued that the judge failed to give any reasons for placing no weight on the evidence of the witness.*
 10. The Secretary of State opposed the appeal in a Rule 24 response dated 2 January 2024, the relevant part of which reads:
 2. The respondent opposes the appellant's appeal. In summary, the respondent will submit inter alia that the judge of the First-tier Tribunal directed himself appropriately.
 3. The FTTJ sets out the evidence at length and the relevant findings of the previous Tribunal. The FTTJ appropriately directs himself to considering matters in the round [19] and identifies the previous findings as a starting point and the subsequent evidence relied upon at [22]. As set out in the decision, the FTTJ at [22-32] considers this 'new evidence' and makes clear findings of fact of which aside from ground 3 which refers to [30] they remain findings that are unchallenged.
 4. The grounds (1 and 2) make the similar point of structural defect and inadequate reasoning with reference to Mibanga. It is submitted that the guidance set out in QC (verification of documents; Mibanga duty) [2021] UKUT 33 (IAC) (12 January 2021) (bailii.org) is applicable in this instance:

The Mibanga duty

(2) Credibility is not necessarily an essential component of a successful claim to be in need of international protection. Where credibility has a role to play, its relevance to the overall outcome will vary, depending on the nature of the case. What that relevance is to a particular claim needs to be established with some care by the judicial fact-finder. It is only once this is done that the practical application of the "Mibanga duty" to consider credibility "in the round" can be understood (Francois

Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367). The significance of a piece of evidence that emanates from a third party source may well depend upon what is at stake in terms of the individual's credibility.

- 5.
6. *(3) What the case law reveals is that the judicial fact-finder has a duty to make his or her decision by reference to all the relevant evidence and needs to show in their decision that they have done so. The actual way in which the fact-finder goes about this task is a matter for them. As has been pointed out, one has to start somewhere. At the end of the day, what matters is whether the decision contains legally adequate reasons for the outcome. The greater the apparent cogency and relevance of a particular piece of evidence, the greater is the need for the judicial factfinder to show that they have had due regard to that evidence; and, if the fact-finder's overall conclusion is contrary to the apparent thrust of that evidence, the greater is the need to explain why that evidence has not brought about a different outcome.*
7. In this instance the FTTJ had established the starting point for consideration in line with Devaseelan principles, and considered the new evidence relied upon and found it to be insufficient to depart from the previous conclusion of the Tribunal. This holistic assessment of the evidence included that of the witness MG which was set out by the FTTJ. In reality, the FTTJ concluded that the new evidence was insufficient in weight to depart from the previous findings of the Tribunal [34]. When read as a whole, those are the reasons given by the FTTJ. The witness MG does not comment on the BC and RC which the FTTJ considered to be weighty material matters in the consideration.
8. As to ground 3 (not copied in the version of the grounds supplied in the application to the UT) – this has been replicated from the version of the CCD platform:

Ground(iii) –Procedural Fairness and Inadvertent Mistake of Fact

12.Thirdly, the Appellant submits that the decision of the Judge below is bad because she has inadvertently proceeded on the basis of a mistake of fact. At §30of her decision, the Judge takes against the Appellant's repatriation card("RC")on the basis of an error in the translation. The document was wrongly translated as saying that the Appellant and her father were deported in 1992. Given that this was the date that they had moved to (as opposed to the date they were deported from) Ethiopia, the Judge considers that this matter impacts the weight she can attach to the repatriation card.

13.This issue arose because of an error in the translation. This error has now been rectified. The original translation company has acknowledged the mistake. Documents dealing with the above are appended to this application for permission to appeal. 14.Notwithstanding that the corrected translation now relied upon was not before the Judge, its content is capable of supporting a point of law justifying onward appeal. In MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)it was held at headnote 2:

"A successful appeal is not dependent on the demonstration of some failing on the part of the FtT. Thus an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the FtT, was not considered, with resulting unfairness (E & R v Secretary of State for the Home Department[2004] EWCA Civ 49).

15.And further at §22:

"We consider it important to emphasise that in appeals of the present kind the criterion to be applied is not that of reasonableness. In this respect, the present case is a paradigm of its type. Judge Levin's conduct of the hearing at first instance was beyond reproach. The irregularity which has been exposed is entirely unrelated to how the hearing was conducted. The judge cannot possibly be faulted for the non-emergence of the solicitor's letter. On any showing, the judge acted

responsibly and reasonably throughout. However, as the authorities demonstrate clearly, the criterion to be applied on review or appeal is fairness, not reasonableness."

16.Finally, at §23: "Alternatively phrased, the terminology of sections 11 and 12 of the 2007 Act does not exclude the possibility of correcting unfairness on the basis that the problem does not arise because of any failure by the Tribunal itself.[...]The point to be emphasised is that the judge's conduct of the hearing is not to be evaluated by reference to a test of reasonableness or fault. Common law fairness is of a quite distinct hue and unfairness is not dependent on demonstrating either."

17.In order to establish an inadvertent mistake of fact on the Judge's part, it is necessary to show that the Judge's conclusion on a particular point is plainly wrong. In the present case that is made out. It is clear that the matter of concern that the Judge had about this document has been answered. It was a straightforward error, and not one of the Appellant's making. In those circumstances, whilst no fault can be ascribed to the Judge for the approach she took to this point, it is just in all the circumstances for the Appellant's case to be assessed upon the correct factual footing, with the correct understanding of the content of the evidence upon which she relies placed before the fact finding Tribunal.

9. The amended translation provided for the Repatriation Card (RC) simply substitutes the word 'migration' for the previously translated word 'deportation'. No explanation is proffered on why this occurred or how such a mistake was made. The grounds fail to address the Ladd v Marshall principles referred to in MM (unfairness; E & R) Sudan [2014] UKUT 105 (IAC) (24 February 2014) (bailii.org), the first being that the 'new evidence could not with reasonable diligence have been obtained for the use at the trial/hearing'. In that regard, the RFRL page 9 dated 21/01/22, when considering the RC (it being submitted as part of the further submissions application) made the point that the RC referred to a date of deportation being 1992. In reality, the FTTJ considered the matter some 15 months later on 04/04/23. Any such claimed translation error could have been identified with reasonable diligence in these circumstances. It is submitted that the argument fails at the first hurdle of the Ladd v Marshall test, and the grounds do not point to any degree of exceptionality in the instant case such that those principles should be departed from - see Akter (appellate jurisdiction, E and R challenges) Bangladesh [2021] UKUT 272 (IAC) (22 Oct 2021) (bailii.org).

(3) In deciding whether the principles in Ladd v Marshall [1954] 1 WLR 1489, as applied by E & R, should be modified in exceptional circumstances, the ability to make fresh submissions to the Secretary of State, pursuant to paragraph 353 of the immigration rules, is highly material to the question of whether those principles should be diluted.

10. It is submitted that there are no exceptional circumstances in this matter. The respondent requests an oral hearing.

Discussion and analysis

11. Ground 1, failure to consider the evidence in the round, refers to the Judge's findings at [33]. In this paragraph the Judge wrote:

33. The evidence of MG, I find, does not add any weight to the appellant's claim given my findings on the BC and RC. While he claims to have known the appellant in Eritrea and supports her account of what she claims occurred there, her account was found to be incredible by the previous Judge - and the new evidence before me now is not such that those findings should be departed from.

12. The Appellant refers to the decision of the Court of Appeal in Mibanga [2005] EWCA Civ 367 as cited by the Court of Appeal in the later decision of AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123.
13. The principal set out in the grounds on which Mr Holmes made his submissions is not disputed, namely that there is a requirement for a judge to consider all the evidence in the round before arriving at his or her conclusions, and that if a judge rejects an asylum claim on adverse credibility grounds before considering the evidence that will be an error of approach.
14. The decision in the Mibanga was considered by the Court of Appeal in S v Secretary of State for the Home Department which found that the facts of Mabanga were unique and that an error of law would only arise in such a case where there had been an artificial separation between the evidence and the conclusion of the judge.
15. It is also important to assess the merits of the appeal by reference to the guidance provided by the Court of Appeal in Volpi v Volpi [2022] EWCA Civ 462 and Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201.
16. The Judge sets out the reasons the original judge found the Appellant's claim to lack credibility at [21] which wholly justified the decision being made at that stage that the Appellant is a national of Ethiopia.
17. The Judge noted the new evidence relied upon by the Appellant at [22] and analyses that in the following paragraphs. It is important to read those paragraphs between [22] to [32] before reading [33], the paragraph challenged in the Grounds seeking permission to appeal. It is also important to read that paragraph in full. Having done so I do not find that the Appellant has made out that there is the degree of artificial separation suggested in the pleadings and submissions sufficient to amount to a material error of law. The Judge's core finding in [33] is "*and the new evidence before me now is not such that those findings should be departed from*". That evidence included the evidence of all the witnesses including MG.
18. Whilst the wording of [33] may have caused some concern, as noted in Volpi v Volpi "*vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.*"
19. I do find when reading the determination as a whole that the Judge failed to consider any of the evidence with the required degree of anxious scrutiny. No material legal error is made out.
20. Ground (ii), pleaded in the alternative, is that the Judge failed to give any or adequate reasons for concluding that the evidence of the Appellant's supporting witnesses "is of no moment in the Appellant's appeal".
21. A reading of the determination shows that the Judge, having assessed the evidence, concluded as stated in the determination. The reason the appeal was dismissed was that the weight given to the evidence did not enable the Appellant to succeed. The requirement is for reasons to be adequate, not perfect. A reader of the determination is able to understand why the Judge came to the conclusion set out in the determination. There is no requirement for the Judge to give reasons for reasons as it may be suggested Ground (ii) seeks. No material legal error is made out.
22. Ground (iii) asserts procedural unfairness and inadvertent mistake of fact. This relates to the Judge's findings at [30] where there is reference to a Repatriation Card (RC). In that paragraph the judge writes:

30. Also, the RC said to be for the appellant's father, in the English translation, records the place of deportation as being Addis Ababa and the year of deportation as 1992. Yet it is the appellant's claim that it was in 1992 that they left Eritrea for Ethiopia and that they will be deported back to Eritrea in 2000. The appellant does not suggest this is a translation error. Whilst the appellant says in her statement of 30/02/22 that "*I moved to Ethiopia when I was almost 1 year old. 1992 is the year I migrated but the Repatriations Card states the dates that the family migrated from Eritrea to Ethiopia*" [sic]. I have considered her rationale, but the RC does not say this. It states the year the appellant's father was deported from Ethiopia to Eritrea as 1992. The expert has not addressed this in their report; given it contradicts what she appellant claims occurred, the weight I can attach to it is limited and I find it does not take the appellant's claim any further.
23. The Appellant in the Grounds asserts that the document was wrongly translated as saying that she and her father were deported in 1992 as that was the date that they had moved to, as opposed to the date they were deported from, Ethiopia. The Grounds claim the error has been rectified and those who provided the original translation acknowledged their mistake.
24. The Grounds refer to the decision of the Tribunal in MM (unfairness; E&R) Sudan [2014] UKUT 00105(IAC) and at [17] of the grounds claim:
17. In order to establish an inadvertent mistake of fact on the Judge's part, it is necessary to show that the Judge's conclusion on a particular point is plainly wrong. In the present case that is made out. It is clear that the matter of concern that the Judge had about this document has been answered. It was a straightforward error, and not one of the Appellant's making. In those circumstances, whilst no fault can be ascribed to the Judge for the approach she took to this point, it is just in all the circumstances for the Appellant's case to be assessed upon the correct factual footing, with the correct understanding of the content of the evidence upon which she relies placed before the fact finding Tribunal.
25. The Court of Appeal handed down its decision in E & R v Secretary of State for the Home Department [2004] EWCA Civ 49 in which it set out the test to be applied in a case where an error of fact is alleged. In his judgement, with which the other members of the Court agreed, Carnwath LJ found there were four factors which show the ordinary requirements for a finding of unfairness being:
- (i) The mistake must be asked to an existing relevant fact, including a mistake as to the availability of evidence on a matter.
 - (ii) The fact or evidence must be uncontentious and objectively verifiable.
 - (iii) The appellant cannot be held responsible for the mistake.
 - (iv) The mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.
26. The Appellant seeks to rely on post-hearing evidence namely what is described as a perfected translation substituting what was said to be the correct word for word that was improperly translated. The respondent in the Rule 24 reply does not challenge what is said to be the correction but does refer to the Ladd v Marshall principles which are not addressed in the Grounds seeking permission to appeal.
27. One would have thought that the evidence being provided to the First-tier Tribunal would have been checked to ensure it was consistent with the Appellant's account. Had a check been carried out the inconsistency between the translated document and what the Appellant was claiming would no doubt have been revealed. It is therefore not made out that the new evidence could not have been obtained for use at the hearing with reasonable diligence.

28. Returning to the E & R test, and assuming the first two criteria are satisfied, it is not made out that third criteria is satisfied, for even though the Appellant may not be personally responsible for the mistake it appears that those advising her are.
29. In relation to the fourth point, that the mistake must have played a material part, this is not adequately addressed in the Grounds seeking permission to appeal. What was said on the Repatriations Card was not the material issue that led to the Judge to dismiss the appeal. It was one of those matters the Judge considered. Whilst the Appellant may argue that it does support what was said about her circumstances in the past it is not been shown that it was material to the Judge's decision. I do not find the mistake played a material part in the Judge's reasoning.
30. Whilst the Appellant may disagree with the Judge's decision, I find in light of the guidance provided by the Court of Appeal, the issues set out above, and in the Rule 24 response, that the Appellant has failed to establish arguable legal error material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this matter. No procedural unfairness arises.

Notice of Decision

31. No legal error material to the decision to dismiss the appeal is made out. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 May 2024